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IN THE

Supreme Court of the United States

October Term, 1968

No. 992

HOWARD ROSS and BERNARD ROSS, as Trustees for LENA ROSENBAUM,

Petitioners,

—v.—

ROBERT A. BERNHARD, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

Constitutional Provisions, Statutes and Rules Involved

The Seventh Amendment to the Constitution of the United States, the Act of June 19, 1934 (48 Stat. 1064), §2072 of title 28, U.S.C., Rule 38 of the Federal Rules of Civil Procedure and Equity Rule 27 (226 U.S. 656) are set forth in an appendix to this brief.

The Questions Presented

1. Irrespective of the nature of the claim asserted on behalf of the corporation, does the plaintiff in a stockholder's derivative suit have a personal constitutional right to trial by jury of the claim asserted on behalf of the corporation?

2. In a stockholder's derivative suit for a judgment which would require officers and directors to account for and pay to the corporation their profits and gains and its losses allegedly arising out of breaches of fiduciary duty, does the plaintiff stockholder have a personal constitutional right to trial by jury of the claim asserted on behalf of the corporation?

Statement of the Case

This stockholders' derivative suit is brought on behalf of The Lehman Corporation, a closed-end investment company which is registered as such under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 et seq.* The claims asserted in the second amended complaint are in substance as follows:

(1) Lehman Brothers, acting as the corporation's investment adviser and principal broker, executes the corporation's portfolio transactions in *listed* securities on the securities exchanges on which they are listed rather than off such exchanges in the so-called "third market", where it is alleged that such transactions could be executed at more favorable prices (A. 23).

(2) In executing portfolio transactions in *unlisted* or over-the-counter securities, Lehman Brothers has "interposed" itself between the corporation and those securities dealers with whom the corporation could allegedly deal directly at more favorable prices (A. 23).

* The second amended complaint alleges that plaintiffs sue representatively on behalf of the corporation's shareholders as well as derivatively on behalf of the corporation, but plaintiffs conceded in the District Court that they sought no relief except on behalf of the corporation (A. 46). (The references are to the indicated pages of the Appendix.)

(3) Lehman Brothers receives excessive investment advisory compensation by reason of the fact that approximately 15% of the corporation's brokerage commissions are allocated to brokers who provide investment advice to Lehman Brothers (A. 24-25).

(4) The board of directors of the corporation is unlawfully constituted in that at least 50% of its members are affiliated with or controlled by Lehman Brothers (A. 25-26).

All of this, the second amended complaint alleges, constitutes (A. 26):

> ". . . an unlawful and willful conversion by Lehman Brothers and the individual defendants of the monies, funds, property and assets of the Corporation to the use of Lehman Brothers . . . and gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence and a reckless disregard of their fiduciary duties by the Corporation's officers, directors and brokers in violation of the duties which the Act . . . expressly and by necessary implication imposes upon officers, directors and brokers of investment companies."

The relief demanded is a judgment "requiring the defendants jointly and severally to account for and pay to the Corporation for their profits and gains and its losses." (A. 27).

All defendants moved in the District Court to strike plaintiffs' demand for trial by jury. The District Court denied the motion and the Court of Appeals for the Second Circuit reversed.

ARGUMENT

I

A plaintiff in a stockholder's derivative suit has no constitutional right to trial by jury

The issue here is whether in a stockholder's derivative suit—a creature of equity unknown to the common law—a plaintiff stockholder has a constitutional right to trial by jury. The decision which petitioners challenge was clearly correct in its statement and application of the controlling constitutional standard: Was there a right to jury trial in a stockholder's derivative suit at the time of the enactment of the Seventh Amendment in 1791 or, indeed, at any subsequent time? The Court of Appeals correctly held that the stockholder's suit has always been a suit in equity and that there was no right to jury trial in such a suit.

The constitutional right to trial by jury stems from the Seventh Amendment, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 38(a) of the Federal Rules of Civil Procedure, preserves the Seventh Amendment right, providing:

> "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

This Court has made it clear that history is the criterion by which the right to trial by jury is to be determined. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *Baltimore & C. Line v. Redman*, 295 U.S. 654, 660 (1935). In the *Schiedt* case the Court stated the test:

> "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791. *Thompson v. Utah*, 170 U.S. 343, 350; *Patton v. United States*, 281 U.S. 276, 288. . . ."

The teaching of history is that whether before or after 1791, in England as well as in the United States, the stockholder's derivative suit was a creature of equity. There never was any right to trial by jury in such a suit.

The first stockholder's derivative suit to come to this Court was *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855). In that case, the Court stressed that the "stockholder's bill" was an invention of equity "for prevention of injuries for which common-law courts were inadequate":

> "We will consider the points in their order. The first comprehends two propositions, namely: that courts of equity have no jurisdiction over corporations, as such, at the suit of a stockholder for violations of charters, and none for the errors of judgment of those who manage their business ordinarily.
>
> "There has been a conflict of judicial authority in both. Still, it has been found necessary, for prevention of injuries for which common-law courts were inadequate, to entertain in equity such a jurisdiction in the progressive development of the powers and

effects of private corporations upon all the business and interests of society.

"It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. 2 Russ. & Mylne Ch. R., Cunliffe v. Manchester and Bolton Canal Company, 480, n.; Ware v. Grand Junction Water Company, 2 Russ. & Mylne, 470; Bagshaw v. Eastern Counties Railway Company, 7 Hare Ch. R. 114; Angell & Ames, 4th ed. 424, and the other cases there cited." 59 U.S. at 341.

The equitable remedy approved by this Court in *Dodge* v. *Woolsey* soon became the subject of abuse as corporations procured stockholders to bring derivative suits to take advantage of diversity jurisdiction that might not otherwise be available. In *Hawes* v. *Oakland*, 104 U.S. 450 (1881), the Court attempted to curb such abuses by holding that a stockholder could not sue on behalf of the corporation unless he held its stock at the time of the wrong complained of and

unless the corporation refused, despite honest efforts by the stockholder, to bring the action on its own behalf. The Court said:

> "... it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.
>
> "The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit." 104 U.S. at 460, 461.

The precaution devised in *Hawes v. Oakland* was almost simultaneously promulgated as Equity Rule 94 (104 U.S. ix). That Rule, with only minor revision, became Equity

Rule 27 in 1913 (226 U.S. 629, 656) and later the original Rule 23 of the Federal Rules of Civil Procedure.

Clearly then, the stockholder's derivative suit, since first recognized by the Supreme Court, has been considered a creature of equity and specifically treated as such in the Equity Rules. As Mr. Justice Jackson said in *Koster v. Lumbermens Mutual Co.*, 330 U.S. 518, 522 (1947), eight years after the Equity Rules were "merged" into the Federal Rules of Civil Procedure:

> "The stockholder's derivative action, to which this policyholder's action is analogous, is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corporate managers. Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs. Equity therefore traditionally entertains the derivative or secondary action by which a single stockholder may sue in the corporation's right when he shows that the corporation on proper demand has refused to pursue a remedy, or shows facts that demonstrate the futility of such a request. With possible rare exceptions, these actions involve only issues of state law and, as in the present case, can get into federal courts only by reason of diversity in citizenship of the parties. Their existence and peculiar character were recognized by this Court in the old Equity Rules. Rule 27, 226 U.S. 656."

Petitioners do not dispute that the stockholder's derivative suit is an invention of equity and that historically no right to trial by jury was recognized (Br. 5). They contend instead—despite the plain language of the Seventh Amendment—that all was changed by the merger of law and equity

which was effected by the adoption of the Federal Rules of Civil Procedure in 1938 and by this Court's decisions in *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962) and *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1957).

Petitioners rest upon the theory that the stockholder asserts two separate claims in a derivative suit—an equitable claim against the corporation for failure to bring suit against the alleged wrongdoer, and a legal claim on behalf of the corporation—and that courts of equity historically took jurisdiction of the second claim only as a function of their now obsolete "clean-up" power to dispose of related legal issues in order that a litigant not be required to institute an additional suit at law. Petitioners contend that now, with the merger of law and equity, the first claim can be tried to the court and the second to a jury.

One flaw in this ingenious theory (for which no authority is cited) is that the clean-up doctrine was not the basis for equity's jurisdiction over derivative suits. Pomeroy in his authoritative treatise exhaustively examines the many kinds of suit in which clean-up jurisdiction was exercised, but derivative suits are nowhere mentioned in this connection. 1 Pomeroy, Equity Jurisprudence, pp. 410-458 (5th ed. 1941). Pomeroy explains the basis of equity jurisdiction over derivative suits as follows:

> "Although the corporation holds all the title, legal or equitable, to the corporate property, and is the *immediate cestui que trust* under the directors with respect to such property, and is theoretically the only proper party to sue for wrongful dealings with that property, yet courts of equity recognize the truth that the stockholders are *ultimately* the only beneficiaries; that their rights are really, though in-

directly, protected by remedies given to the corporation; and that the final object of suits by the corporation is to maintain the interests of the stockholders. . . . Wherever a cause of action exists primarily in behalf of the corporation against directors, officers, and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation *either actually or virtually refuses* to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors, officers, and other persons; . . ." 4 POMEROY, *op. cit. supra*, at 276, 277.

Clearly, as this Court's early decisions confirm (see *Dodge* v. *Woolsey, supra*; *Hawes* v. *Oakland, supra*), equity jurisdiction over derivative suits was not in any sense predicated upon the clean-up doctrine.

A second flaw in petitioners' theory is that the two elements of a derivative claim were never considered separate and divisible for purposes of determining the right to jury trial. As this Court stated in *Dairy Queen* v. *Wood*, *supra*, at 470, 471, prior to the promulgation of the Federal Rules of Civil Procedure in 1938, federal equity courts could not take jurisdiction of suits in which legal and equitable claims were joined. *Scott* v. *Neely*, 140 U.S. 106 (1891); *Cates* v. *Allen*, 149 U.S. 451 (1893). To do so would have created a "conflict with the constitutional provision by which the right to a trial by jury is secured." *Cates* v. *Allen*,

supra, at 457. Yet it is undisputed that federal courts did accept jurisdiction of derivative suits. In consistently recognizing between 1855 and 1938 that stockholder's derivative suits were maintainable in the federal equity courts, this Court necessarily rejected the notion that for the purpose of determining rights to jury trial, derivative suits consisted of separate legal and equitable claims.

The right to jury trial in derivative actions has been considered many times by courts and commentators since the remedy was first recognized. Save for the Ninth Circuit in *DePinto v. Provident Security Life Insurance Company*, 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964) and the District Court in the present case, all have agreed that the equitable nature of the action precludes the right to jury trial. *Brinckerhoff v. Bostwick*, 105 N.Y. 567 (1887); *Bookbinder v. Chase National Bank of New York*, 244 App. Div. 2d 650 (1st Dep't 1935); *Anderson v. Derrick*, 220 Cal. 770, 32 P.2d 1078 (1934); *Metcalf v. Shamel*, 166 Cal. App. 2d 789, 333 P.2d 857 (2d Dist. 1959); *Morton v. Morton Realty Co.*, 41 Idaho 729, 241 Pac. 1014 (1925); *Neff v. Barber*, 165 Wis. 503, 162 N.W. 667 (1917); *Steinway v. Griffith Consol. Theatres*, ~~273~~ P.2d 872 (Okla. 1954). 13 Fletcher, Private Corporations, § 5931 (Rev. ed. 1961); 2 Hornstein, Corporation Law and Practice, ¶ 730 (1959); Lattin, Corporations, ch. 8 § 3 (1959); Note, *The Right to a Jury Trial in a Stockholder's Derivative Action*, 74 Yale L.J. 725 (1965).

Judge Mansfield, in following the long line of authority cited above in *Richland v. Crandall*, 259 F. Supp. 274, 279-80 n. 8 (S.D.N.Y. 1966), stated well the error in the *DePinto* reasoning. He wrote:

"That decision, in this court's opinion, rests upon the erroneous assumption that if the *corporation* could have made any of the claims the subject of a 'Suit at common law' entitling *it* to demand a jury trial under the Seventh Amendment, the stockholder suing derivatively would also be entitled to do so. This reasoning ignores the fact that the corporation's suit could be one at common law, whereas the stockholders' derivative suit could not. In effect the court in DePinto divided one derivative suit into two actions (1) a suit by the shareholder, and (2) a suit by the corporation, whereas in fact there is but one action, an equity suit by the shareholder which must be brought exclusively in equity, regardless of the relief sought."

The Court below put it even more succinctly (A. 69):

"It is from the fountainhead of equity that this entire litigation flows, and we see no justification for artificially dividing the suit into two parts for the purposes of applying the Seventh Amendment."

History is decisive here and compels the result reached below by the Court of Appeals.

II

The claim asserted on behalf of the corporation is equitable in nature and hence not triable to a jury

Petitioners' second amended complaint belies on its face their characterization of their claim as legal in nature. The complaint clearly and unequivocally accuses the defendants of fraud and overreaching, of willful and deliberate breaches of duties which are alleged to be "fiduciary" (pars.

15, 17, 21, 22). It seeks as relief an accounting for "profits" allegedly illgotten through breach of defendants' fiduciary duty as officers, directors and investment advisors.

Traditionally such a claim was cognizable only in equity, where the remedy was fashioned out of existing trust law. *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. Jun. 43 (1793); *Adley v. The Whitstable Company*, 17 Ves. Jun. 315 (1810).

> "There is nothing better established, than that this Court does not entertain a general jurisdiction to regulate and control charities established by charter. There the establishment is fixed and determined; and the Court has no power to vary it. If the Governors, established for the regulation of it, are not those, who have the management of the revenues, this Court has no jurisdiction; and, if it is ever so much abused, as far as respects the jurisdiction of this Court, it is without remedy; but if those, established as Governors, have also the management of the revenues, this Court does assume a jurisdiction of necessity, so far as they are to be considered as trustees of the revenue. That is stated in the book upon charitable uses; and referred to in several authorities; particularly in *Attorney-General v. Smart*, 1 *Ves. sen.* 72; and *Attorney-General v. Middleton*, 2 *Ves. sen.* 327. The result is, this Court must not hastily take upon itself to interfere with those, who have by charter, and in this case by act of Parliament, the whole control over this charity. But, where, having also the management of the revenues, they are abusing their trust, the Court has jurisdiction." 2 Ves. Jun. at 47.

Claims such as this have always been regarded as equitable in nature in this country as well. Here too they arose

in equity as a natural extension of equity's jurisdiction over trustees. *Robinson* v. *Smith*, 3 Paige Ch. 221, 231 (N.Y. 1832):

> "I have no hesitation in declaring it as the law of this State that the directors of a moneyed or other joint-stock corporation, who willfully abuse their trust or misapply the funds of the company, by which a loss is sustained, are personally liable, as trustees, to make good that loss. And they are equally liable if they suffer the corporate funds or property to be lost or wasted by gross negligence and inattention to the duties of their trust. Independent of the provisions of the Revised Statutes, which were passed after the filing of this bill, this court had jurisdiction, so far as the individual rights of the corporators were concerned, to call the directors to account, and compel them to make satisfaction for any loss arising from a fraudulent breach of trust or the willful neglect of a known duty. To this extent *Chancellor* Kent, in the case of *Attorney-General* v. *Utica Ins. Co.*, 2 Johns. Ch. 389, admitted the court had jurisdiction, although he doubted the general powers of this court over the corporation itself to prevent an abuse of its corporate privileges. Until very recently but few incorporated companies in which individuals had any direct pecuniary interest existed in England, except corporations for charitable purposes. And this court would very reluctantly interfere with the concerns of mere municipal corporations, where a sufficient remedy is afforded by *mandamus* or *quo warranto*, or by an indictment against the officers of the corporation, for any abuse of their powers, by which the public has sustained an injury. But since the introduction of joint-stock corporations, which are mere partnerships, except in form, the principles which were formerly applied to charitable corporations in England may be very

appropriately extended to such companies here. The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation. See Wood, Inst. bk. 1, chap. 8, p. 110; 11 Co. 98, *b*. And no injury the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy."

As the Second Circuit said more recently in another connection in *Schine* v. *Schine*, 367 F. 2d 685, 687 (2d Cir. 1966):

> "Plaintiffs' fourth claim, for an accounting based on defendants' alleged breaches of their fiduciary duty as officers, directors, and majority stockholders, would have been cognizable in equity before the merger of law and equity."

To the same effect is *Miller* v. *Weiant*, 42 F. Supp. 760, 761 (E.D. Ohio 1942):

> "The Court is persuaded that this is a suit in equity. It is not denied that a corporation may maintain a suit against its officers and directors, or any of them, for an accounting of funds and assets entrusted to them which have been dissipated by their fraud or negligence. In such a case, the suit has always been in equity, the officers and directors being considered as quasi trustees of the assets."

Similarly, in *In re The Van Sweringen Co.*, 119 F.2d 231, 235 (6th Cir. 1941), the Court stated:

> "Where the directors of a corporation, contrary to their fiduciary duty, have made a personal profit in their dealings with the corporation, equity will compel them to account to the corporation for such profits made at its expense."

Nothing in *Dairy Queen, Inc.* v. *Wood*, supra, suggests a contrary view. There the plaintiff sued, among other things, upon "a written licensing contract . . . under which [defendant] agreed to pay some \$150,000", alleging that defendant was in default under the contract "in excess of \$60,000.00", and sought "an accounting to determine the exact amount of money owing" (369 U.S. at 473, 475). The Court held that the claim, although labeled "accounting", was truly legal in nature (369 U.S. at 477):

> "As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character."

In such a case, the Court found, the plaintiff's characterization of its claim as one for an accounting could not defeat the defendant's right to trial by jury.

Here on the other hand, plaintiffs do not rely upon any contract, but upon the fiduciary relationships alleged to exist between The Lehman Corporation and the individual defendants (A. 26). There is no specific amount of damages claimed. Plaintiffs do not seek to recover a debt, but pray for defendants "to account for and pay to the Corporation for their profits and gains and its losses" (A. 27).

Moreover, unlike the cases cited in petitioners' brief, the gravamen of the complaint here is not mere negligence. Paragraphs 21 and 22 (A. 26) allege that payment of the brokerage commissions under attack were "willful" acts (par. 21), constituting "a waste and spoliation of the Corporation's assets for the benefit and profit of Lehman Brothers and the individual defendants." (par. 22). Paragraph 17 (A. 24) ascribes the actions of the corporation to the fact that "Lehman Brothers, which dominates and con-

trols the Corporation, prefers to profit at the Corporation's expense and to its détriment." The word "negligence" appears only once, and that is in the latter part of paragraph 21, where it is included as one of a string of epithets totally inconsistent with mere negligence, gross or otherwise.*

Petitioners' reliance on *Simler v. Connor,* 372 U.S. 221, 222 (1963) is misplaced. That case was a declaratory judgment action to determine the amount due under a contingent fee contract. As the Court's opinion and the cases cited—*Trist v. Child,* 88 U.S. (21 Wall.) 441, 447 (1874) and *Stanton v. Embrey,* 93 U.S. 548 (1876)—make clear, the basis of decision was the fact that the suit was in essence a contract action. Here, as has been pointed out previously, petitioners do not sue on a contract, but upon an alleged fiduciary relationship between respondents and the corporation.

Even were petitioners correct that their claim was legal in nature, they still would not be entitled to a jury trial. This Court in *Dairy Queen* recognized that even "on a cause of action cognizable at law," the issues involved may be so complicated that "only a court of equity can satisfac-

* The full text of paragraph 21 is as follows:

"21. The payment of these brokerage commissions to Lehman Brothers and others has constituted and continues to constitute an unlawful and willful conversion by Lehman Brothers and the individual defendants of the monies, funds, property and assets of the Corporation to the use of Lehman Brothers in violation of Sec. 37 of the Act; and gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence and a reckless disregard of their fiduciary duties by the Corporation's officers, directors and brokers in violation of the duties which the Act (Secs. 1(b)(2), 10, 17(h) and (i) and 36) expressly and by necessary implication imposes upon officers, directors and brokers of investment companies."

torily unravel them", 369 U.S. at 478. Manifestly this is such a case.

The complexity of the action is obvious from the complaint. It alleges that over the past five years, Lehman Brothers has received approximately $2,000,000 in brokerage commissions from the corporation (A. 22). In those five years there were many thousands of separate portfolio transactions aggregating scores of millions of dollars. Alleging that some of these thousands of transactions were improperly executed at excessive cost to the corporation, plaintiffs seek an accounting for defendants' "profits".

Since plaintiffs allege one species of breach of trust in connection with transactions in listed securities and quite another in connection with transactions in unlisted securities, the task confronting the trier of fact will be to examine the two types of transactions separately. The trier of fact may be required to cull from many thousands of transactions in listed securities those which plaintiffs claim could have been executed off the exchange in the so-called "third market" and to determine with respect to each such transaction whether the "third market" offered advantages to the corporation which the defendants unlawfully forsook. With respect to over-the-counter transactions, the trier of fact may be required to determine with respect to each whether Lehman Brothers was unnecessarily "interposed", and if so, whether the corporation was damaged and in what amount. And if any transactions, whether in listed or in unlisted securities, are found to have been unlawful, the trier of fact may be required to determine as to each the extent to which defendants profited unlawfully. Thus, each of many thousands of transactions may require a pre-

cise and obviously difficult measurement of claimed disadvantage to the corporation.

It would be a perversion of history to suggest that the dissatisfaction with the Constitution as first presented to the states for adoption and which gave rise to the first ten amendments was rooted in any conviction that cases of such complexity should be tried by veniremen of the community. The contemporaneous literature demonstrates, to the contrary, a recognition that "nice and intricate" issues of this character "are incompatible with the genius of trials by jury."

As Hamilton pointed out in THE FEDERALIST while the first ten amendments were being considered by the states:

> ". . . the circumstances that constitute cases proper for courts of equity, are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long and critical investigation, as would be impracticable to men called occasionally from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require, that the matter to be decided should be reduced to some single and obvious point; while the litigations usually in chancery, frequently comprehend a long train of minute and independent particulars." THE FEDERALIST, No. 83, p. 621.

See also Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49-132 (1934).

CONCLUSION

The order of the Court of Appeals should be affirmed.

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